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In the Supreme Court of the United States

OCTOBER TERM, 1978

TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA), ET AL., PETITIONERS

v.

HARRY LEWIS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF ON REARGUMENT FOR THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530

RALPH C. FERRARA
General Counsel

PAUL GONSON
Principal Associate General Counsel

JAMES H. SCHROPP
Assistant General Counsel

ANNE C. FLANNERY
Attorney
Securities and Exchange Commission
Washington, D.C. 20549

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QUESTION PRESENTED

Whether there is a private right of action under Section 206 of the Investment Advisers Act of 1940.

PRELIMINARY STATEMENT

Following oral argument on March 20, 1979, the Court restored this case to the calendar for reargu-

ment (order of April 30, 1979). Since the time of oral argument, the Court has handed down several opinions that bear directly on the issues raised by the parties and discussed by the Securities and Exchange Commission ("Commission") in its brief amicus curiae.[1]

While reiterating principles announced in earlier decisions, the Court's recent opinions significantly clarify the circumstances in which a private right of action should be implied under a federal statute not expressly providing for one. They also demonstrate, in our view, that implication of a private right of action for violation of Section 206 of the Investment Advisers Act, 15 U.S.C. 80b-6, is proper in the present circumstances. Accordingly, the Commission submits this supplemental brief amicus curiae in order to discuss the implications of the Court's recent opinions and to respond to certain questions raised by the Court during oral argument concerning the scope of relief that should be available if a cause of action is recognized.

SUMMARY OF ARGUMENT

This Court's recent decisions emphasize that implication of a private right of action presents a question of "statutory construction." *Touche Ross & Co.*

[1] See *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979); *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979); see also *Leroy* v. *Great Western United Corp.*, No. 78-759 (June 26, 1979); *Davis* v. *Passman*, No. 78-5072 (June 5, 1979); *Burks* v. *Lasker*, No. 77-1724 (May 14, 1979); *Chrysler Corp.* v. *Brown*, No. 77-922 (April 18, 1979).

v. *Redington*, No. 78-309 (June 18, 1979), slip op. 7; *Cannon* v. *University of Chicago*, No. 77-926 (May 14, 1979), slip op. 9. In resolving that question, the Court has held, it is necessary to determine "whether Congress intended to create the private right of action asserted." *Touche Ross & Co.*, *supra*, slip op. 7.

The Court has refocused the analysis in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), explaining that a right of action should not be implied simply because a majority of the standards specified in *Cort* has been met. Those standards are not of equal significance, and the central inquiry is "whether Congress intended to create, either expressly or by implication, a private cause of action." *Touche Ross & Co.*, *supra*, slip op. 15.

The "threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member" (*Cannon*, *supra*, slip op. 10) and whether the statute "prohibit[s] certain conduct or create[s] federal rights in favor of private parties." *Touche Ross & Co.*, *supra*, slip op. 8. Only when that question is answered in the affirmative, based on an examination of the language of the statutory provision itself, will the Court proceed to consider the remaining *Cort* factors.

Section 206 of the Investment Advisers Act expressly prohibits an investment adviser from engaging in conduct that would defraud his advisory clients. As this Court has recognized, Congress intended the Investment Advisers Act (of which the antifraud

provision is a central part) to protect a discrete, identifiable class of beneficiaries, *i.e.*, the clients of investment advisers. Congress established "federal fiduciary standards" to govern the relationship between an adviser and his clients (*Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 471 n.11 (1977)), and the provisions of Section 206 were intended to "impos[e] minimum standards on the behavior of investment * * * advisers" for the protection of clients (*Burks* v. *Lasker*, No. 77-1724 (May 14, 1979), slip op. 10 n.10).

Because the literal text of Section 206 both prohibits specific conduct and creates duties for the benefit of the adviser's clients, the threshold standard of *Cannon* and *Cort* is met. Thus, it is appropriate for the Court to evaluate the balance of the *Cort* factors to confirm Congress' intention to permit redress to secure the rights vested in the beneficiary class. Analysis of those factors supports the conclusion that Congress intended to protect the clients of investment advisers from fraudulent conduct and that it intended to enable them to seek redress.

The second relevant factor under *Cannon* and *Cort* is the legislative history. While the legislative history of the Investment Advisers Act is silent with respect to the existence of a private cause of action, the absence of such a reference is not unusual in statutes that create no express remedy. "[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question." *Can-*

non, supra, slip op. 15. Moreover, Congress' failure to amend the statute after its enactment to provide an express remedy is not significant in view of this Court's repeated recognition of implied rights of action under similar statutes, which created a reasonable expectation that the courts would fill in the interstices of the legislation and continue to extend remedies to persons injured by statutory violations. This Court's "decidedly different" approach to implied remedies in recent cases (*Cannon, supra*, slip op. 19 n.24; see *Touche Ross & Co., supra*, slip op. 18) should not be applied retroactively to produce results that Congress would have not intended.

While the third and fourth *Cort* factors are of less importance in determining Congress' intent (see *Touche Ross & Co., supra*, slip op. 15), they too point to the existence of an implied right of action. Recognition of a private right of action under Section 206 would not frustrate the underlying purposes of the statute, the third factor to be considered. Rather, implication of a private right would be "fully consistent with—and in some cases even necessary to —the orderly enforcement of the statute," as in *Cannon, supra*, slip op. 27.

The fourth *Cort* factor requires a determination whether the federal action would impinge upon an area of law traditionally relegated to state regulation. Where, as here, state regulation has traditionally been of little significance and Congress expressly intended to fill a regulatory vacuum by creating federal rights in favor of advisory clients, the recogni-

tion of a federal cause of action to vindicate those rights is appropriate.

Thus, all four of the *Cort* factors support the conclusion that private redress for violations of Section 206 is necessary to achieve what Congress intended, the central inquiry that courts are required to make. *Touche Ross & Co.*, *supra*, slip op. 15. Petitioners have nonetheless argued that a private right cannot be implied because of the jurisdictional provision contained in Section 214 of the statute, 15 U.S.C. 80b-14. The argument that jurisdictional provisions are relevant in deciding whether private remedies derive from substantive statutory provisions was rejected by this Court in *Touche Ross & Co.*, *supra*. Whether a private cause of action should be implied depends on the text of Section 206 itself—the substantive provision sought to be enforced—not on the language of the jurisdictional provision. If there is a cause of action under Section 206, jurisdiction exists under 28 U.S.C. 1331 for the district court to entertain private suits. *Touche Ross & Co.*, *supra*, slip op. 16.

Because the question whether a cause of action exists "is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive" (*Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 11), the Court need not now decide the scope of available remedies. See also *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970). Should the Court determine that it is necessary to reach the separate question regarding the scope of

remedies available in a private suit under Section 206, however, we urge the Court to hold that a district court is empowered to award whatever legal or equitable relief is proven to be necessary under traditional remedial principles.

ARGUMENT

I. THIS COURT'S RECENT DECISIONS CONFIRM THAT A DEFRAUDED CLIENT OF AN INVESTMENT ADVISER MAY BRING SUIT UNDER SECTION 206 OF THE INVESTMENT ADVISERS ACT OF 1940

In *Cannon* v. *University of Chicago*, *supra*, slip op. 9, and *Touche Ross & Co.* v. *Redington*, *supra*, slip op. 7, this Court noted that the mere fact that a federal statute has been violated and some person injured is not sufficient to give rise to a private right of action. At the same time, however, the Court approved the approach in *Cort* v. *Ash*, *supra*, 422 U.S. at 78,[2] in determining whether Congress, expressly

[2] "In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' * * * that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort* v. *Ash*, *supra*, 422 U.S. at 78 (emphasis in original).

or by implication, intended to create a cause of action (*Touche Ross & Co.*, *supra*, slip op. 15) and refined its analysis in certain significant respects. *Cannon*, *supra*, slip op. 9; *Touche Ross & Co.*, *supra*, slip op. 8.

The Court has also explained that the "threshold question"—"whether the statute was enacted for the benefit of a special class of which the plaintiff is a member"—must be answered solely by looking to the language of the statute itself. *Cannon*, *supra*, slip op. 10; *Touche Ross & Co.*, *supra*, slip op. 7. That test is satisfied only if the statute "expressly identifies the class Congress intended to benefit" (*Cannon*, *supra*, slip op. 11) or if it "~~profit~~[s] certain conduct or create[s] federal rights in favor of private parties." *Touche Ross & Co.*, *supra*, slip op. 8.

A. Section 206 identifies the class Congress intended to benefit, prohibits specific conduct by persons having a special relationship with the class, and vests members of the class with federal rights

Section 206 of the Investment Advisers Act, 15 U.S.C. 80b-6, provides that it shall be unlawful for "any investment adviser" to employ any device, scheme, or artifice to defraud "any client," to engage in any transaction, practice, or course of business that operates as a fraud upon "any client," or to engage in specified transactions with clients without making required disclosures. This language manifests a congressional intent to define a class of beneficiaries, to vest the class with federal rights, and to

impose specific duties upon persons having a special relationship with the class.

In *Touche Ross & Co.*, *supra*, the Court concluded that a private right of action should not be implied under Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78q(a).[3] The Court found that the language of Section 17(a) "neither confers rights on private parties nor proscribes any conduct as unlawful." Slip op. 8.[4] By contrast, the Court concluded in *Cannon* that Section 901 of the Education Amendments of 1972, 20 U.S.C. 1681, supports a private remedy.[5] The Court found that the

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[3] The Court found that the provisions of Section 17 are "like * * * [those of] countless other statutes that simply require certain regulated businesses to keep records and file periodic reports to enable the relevant governmental authorities to perform their regulatory functions." *Touche Ross & Co.*, *supra*, slip op. 8-9.

[4] While the Court went on to examine the legislative history of Section 17(a), Congress' silence with respect to any private action reinforced the Court's "decision not to find * * * a right of action implicit within the section." *Touche Ross & Co.*, *supra*, slip op. 10. Under these circumstances, the Court found it unnecessary to consider the plaintiff's arguments that a cause of action under Section 17(a) would satisfy the third and fourth *Cort* tests. Thus, where it has been determined that "the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful," and where the legislative history "simply does not speak to the issue of private remedies," the inquiry is at an end. *Id.* at 15.

[5] Section 901(a) provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

first *Cort* test was met because the statute "expressly identifies the class Congress intended to benefit." *Cannon, supra,* slip op. 11. Since the "threshold" test in *Cort* was satisfied, an examination of the remaining factors specified in *Cort* was appropriate.

The statutory language of Section 206 satisfies the threshold tests prescribed in *Cannon* and *Touche Ross.* Section 206 expressly prohibits certain conduct—fraudulent acts and practices—on the part of specified individuals—investment advisers.[6] Moreover, the statutory provision expressly and repeatedly identifies the class of persons that Congress intend to benefit—the clients of investment advisers.[7] As this Court has previously recognized, the Investment Advisers Act explicitly establishes "federal fiduciary standards" that govern the relationship between an adviser and his clients. *Santa Fe Industries, Inc.* v. *Green, supra,* 430 U.S. at 471 n.11. The provisions of Section 206 "impos[e] minimum standards on the behavior of * * * advisers" for the benefit of their

[6] The regulated class of investment advisers is defined in Section 202(a)(11) of the Act, 15 U.S.C. 80b-2(a)(11).

[7] The antifraud provision of the Investment Advisers Act is thus much more specific than the provision of Section 901 that the Court found to support a private remedy in *Cannon,* both with respect to the class of persons protected and the class of persons against whom the statute's prohibition is directed. In *Cannon,* any "person in the United States" was a potential subject of illegal discrimination, and thus a potential plaintiff; moreover, the category of persons who could violate the statute has not been expressly delineated.

clients. *Burks* v. *Lasker, supra,* slip op. 10 n.10;[8] *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180, 191-192 (1963).

By establishing a federal fiduciary relationship, Congress implicitly intended to create federal remedies in favor of defrauded clients.[9] It would be anomalous to impute to Congress an intent to create a specific fiduciary relationship between advisers and their clients without also authorizing what is necessary to give effect to that relationship—a means to insure accountability when the relationship is breached by fraudulent practices.[10]

[8] In *Burks,* the Court assumed without deciding that a private cause of action could be implied under the Investment Advisers Act (and the Investment Company Act of 1940, 15 U.S.C. 80a-1 *et seq.*). Slip op. 4 n.5.

[9] The provisions of Section 206 serve a purpose that is far different from that served by the recordkeeping requirements of Section 17(a) of the Securities Exchange Act of 1934 considered in *Touche Ross.* See note 3, *supra.* Section 206 creates a standard of honest conduct to which an investment adviser must adhere when transacting business with or on behalf of his clients; a violation of that provision has a much higher likelihood of causing direct injury to the client. Thus, where the fiduciary relationship is shown to have been breached through fraud, the client should be entitled to redress, whether or not the Commission has been alerted to the situation.

[10] In *Cannon,* the Court noted that it would ordinarily be reluctant to imply a cause of action under a statute creating duties "for the benefit of the public at large." Slip op. 13 n.13. Implication of a private right under the Investment Advisers Act would be consistent with that position. By definition, a fiduciary such as an investment adviser is one who owes a high standard of duty to his beneficiaries beyond

The Court has emphasized that "the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication." *Cannon, supra*, slip op. 11 n.13. Here, the literal language of Section 206 both "prohibit[s] certain conduct [and] create[s] federal rights in favor of [clients]." *Touche Ross & Co., supra*, slip op. 8. The threshold test has therefore been met, and the Court should proceed to an evaluation of the additional relevant factors to determine whether Congress intended to create a private cause of action. *Touche Ross & Co., supra*, slip op. 15.

B. Because the language used by Congress shows that Section 206 was enacted for the special benefit of a defined class, the fact that the legislative history is silent on the subject of private remedies does not weigh against the implication of a remedy

The second factor to be considered in determining whether a private right of action should be implied is the legislative history of the statute. *Cannon, supra*, slip op. 15. But as the Court stressed in *Cannon*, the absence of discussion of private remedies in the legislative history does not preclude an implied remedy (*ibid.*) (emphasis in original):

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that owed to the public at large. While the bounds of a fiduciary's obligations may vary depending on the nature of the particular fiduciary relationship, an investment adviser has placed himself in a position of trust and confidence with respect to his clients and should be answerable to them when he fails to meet the minimum standards imposed under the Investment Advisers Act. See *Burks* v. *Lasker, supra*, slip op. 10 n.10.

> We must recognize, however, that the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one "in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling."[11]

As pointed out in our initial brief at pages 15-20, the legislative history of the Investment Advisers Act is silent with respect to private rights of action. That fact is quite neutral, however, because, as discussed above, the legislative history of a statute that neither expressly creates nor denies a private cause of action "will typically be equally silent or ambiguous on the question" of an implied remedy. *Cannon, supra*, slip op. 15. Silence is not fatal to implication where, as here, the statute vests specific rights in the class of beneficiaries (advisory clients) and no purpose to deny such a cause of action is evident. *Ibid.*

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[11] The Court noted that *Cannon* was an atypical case because there was legislative history that "plainly" indicated Congress' intention to create a private remedy. Slip op. 15. The existence of legislative history regarding private remedies may have been the result of Congress' growing sophistication concerning the existence of such frequently litigated issues. Prior to 1940, this Court's opinions had applied relatively simple common law principles in deciding whether to imply a private remedy. See, *e.g., Texas & Pacific Ry.* v. *Rigsby*, 241 U.S. 33, 39 (1916). See also *Cannon, supra*, slip op. 10 & n.10.

Petitioners have argued that Congress' failure to amend the statute to create an express right of action after its enactment in 1940 is evidence that Congress intended to deny a private right (Pet. Br. 16-20). That argument is unpersuasive, however, when viewed in historical perspective. The bills considered by Congress were intended only to codify what the law was already presumed to mean—*i.e.*, to *confirm* the existence of a private cause of action. Thus, amendment of the Act was not a practical necessity.

This Court has acknowledged that its approach to implied private actions has been "decidedly different" in recent years (*Cannon, supra*, slip op. 19 n.24). When Congress' failure to amend the Act in 1970 and 1975 [12] is considered in light of the then-prevailing legal doctrine, its inaction is hardly surprising.[13] The law in 1970 and 1975 was distinctly favorable to the creation of implied remedies in securities cases. In 1964, this Court recognized an implied remedy for violations of the proxy rules promulgated pursuant to Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a). *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964). Earlier, it had announced that the Investment Advisers Act, and Section 206 in particular, were "to be construed like other securities legislation 'enacted for the purpose

[12] The proposed amendments are discussed in our initial brief at pages 26-28.

[13] In considering Congress' actions, "[i]t is always appropriate to assume that our elected representatives * * * know the law." *Cannon, supra*, slip op. 17-18.

of [eliminating] frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*, 375 U.S. at 195 (footnote omitted). By 1971, the Court, in an unanimous opinion, had recognized the existence of a private action for violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, provisions that are nearly identical to those of Section 206. See *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 13 n.9 (1971).

In light of these developments, Congress' failure to take further steps to codify a private remedy is properly understood as a reflection of its belief that a private cause of action already existed under Section 206 and that the courts were fully prepared to vindicate the rights of defrauded advisory clients.[14] Thus, in 1975, when Congress failed to enact a proposed amendment to extend the jurisdiction of district courts under Section 214 of the Act, 15 U.S.C. 80b-14, to "actions at law" without regard to the amount in controversy (see S. 2849, 94th Cong., 2d Sess., Section 6 (1976)), both the congressional hearings and the Senate committee report (which com-

[14] Congress expressly stated that the 1970 amendment to Section 36 of the Investment Company Act of 1940, 15 U.S.C. 80a-35, which created an express right of action against investment advisers under certain circumstances, was not intended to affect other implied remedies. See S. Rep. No. 91-184, 91st Cong., 1st Sess. 16 (1969); H.R. Rep. No. 91-1382, 91st Cong., 2d Sess. 38 (1970).

mented favorably on the amendment) indicate that the amendment was intended merely to confirm the existence of a private cause of action that was assumed to exist already. See S. Rep. No. 94-910, 94th Cong., 2d Sess. 8-9 (1976); *Investment Advisers Act Amendments of 1976: Hearings on S. 2849 Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 17 (1976); *Investment Advisers Act Amendments: Hearings on H.R. 12981 and H.R. 13737 Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. 36-37 (1976).

Congress' assumptions were wholly consistent with the then-prevailing view that the courts would find —as the lower courts indeed have found—that an implied private remedy is available under the Investment Advisers Act. See *Cannon, supra*, slip op. 23-24 & n.34.[15] Indeed, it was not until 1977 that the

[15] As pointed out in *Cannon, supra*, slip op. 19, during the period between 1964 and 1972, the Court "consistently found implied remedies—often in cases much less clear than [*Cannon*]." As Mr. Justice Rehnquist noted in his concurrence in *Cannon* (slip op. 1-2) (emphasis in original), Congress

> tended to rely to a large extent on the courts to *decide* whether there should be a private right of action, rather than determining this question for itself. Cases such as *J. I. Case* v. *Borak, supra*, and numerous cases from other federal courts, gave Congress good reason to think that the federal judiciary would undertake this task.

In *Cannon*, a case involving a gender-discrimination issue, the Court found it appropriate to consider the general recognition of the rule in *Borak* in divining the legislative under-

Court, for the first time, declined to imply a private cause of action for violations of an antifraud provision of the federal securities laws. *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977). Thus, in failing to amend the Act in 1970 and 1975, Congress understandably assumed that express codification of private remedies was an unnecessary act.

C. Implication of a private remedy is consistent with and necessary to effectuate the statutory scheme

Discussing the third factor identified in *Cort*, the *Cannon* opinion notes that "a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme." *Cannon, supra*, slip op. 24. On the other hand, the Court observed that it has been "decidedly receptive" to a private remedy "when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose." *Ibid.* Pointing out that the Department of Health, Education, and Welfare (which was responsible for administering Section 901) perceived no inconsistency between public and private remedies under that section, the Court found "unquestionably correct" the Department's view that an individual remedy would provide effective assistance in achieving the statutory purpose. *Id.* at 27-29. As the Department "candidly admitted," it could not effectively police all federally funded education programs, and even if administrative enforcement was always feasible, it would often not remedy individual injuries. *Id.* at

standing. It may be presumed a fortiori that Congress was aware of *Borak* in the present context, where another antifraud provision of the federal securities laws is involved.

29 n.42. The Court also observed that, while it has "sometimes" denied a private remedy where administrative remedies are available, "it has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute." *Id.* at 28 n.41. Because Section 901 did not provide such a mechanism and because enforcement proceedings, even if brought by the agency, might not result in personal redress for the complainant, the Court concluded that private suits to secure individual relief were "not only sensible" but "fully consistent with—and in some cases even necessary to—the orderly enforcement of the statute." *Cannon, supra,* slip op. 26-27.[16]

Private suits for violation of the antifraud provisions of the Investment Advisers Act are equally necessary to the "orderly enforcement of the statute." *Ibid.* Far from conflicting with the statutory scheme, private actions under Section 206 in favor of advisory clients are necessary to accomplish the purposes sought to be achieved by Congress.

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[16] As the Court also pointed out, administrative agencies may, in their discretion, decide not to investigate complaints. *Cannon, supra,* slip op. 28 n.41. Such decisions ordinarily are not reviewable by the courts. See Section 209(e) of the Investment Advisers Act, 15 U.S.C. 80b-9(e) ("the Commission * * * may in its discretion bring an action"). See also *Southern Ry.* v. *Seaboard Allied Milling Corp.*, No. 78-575 (June 11, 1979), slip op. 3. Thus, a defrauded client could not compel remedial administrative action. See *Kixmiller* v. *SEC*, 492 F.2d 641, 645 (D.C. Cir. 1974).

While the Commission is empowered under the statute to seek equitable relief against an investment adviser who has engaged, is engaged, or is about to engage in action violating the statute,[17] the statute prescribes no methods for defrauded clients to participate in civil or administrative proceedings brought by the Commission. Moreover, remedies obtained by the Commission in enforcement proceedings would ordinarily not include relief for defrauded clients. See *Cannon, supra,* slip op. 28 n.41.[18] And as the Court observed in *Cannon,* an administrative agency, such as the Commission, which is charged with enforcement of the statute, may determine not to initiate proceedings for reasons wholly apart from the underlying merits of a particular case—including limited resources. *Cannon, supra,* slip op. 28-29 & nn. 41-42.[19]

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[17] See Section 209(e) of the Act, 15 U.S.C. 80b-9(e).

[18] The relief sought in a Commission action is ordinarily prospective in nature, *i.e.,* an order enjoining an investment adviser from engaging in future conduct that would violate the statute. Although the basis for such an order includes consideration of past conduct, an injunction generally does not correct past harm. Such an injunction would be of little effect, for example, where an adviser has ceased doing business. Because "equitable relief * * * would be unavailing[,] [a]nd there are available no other alternative forms of judicial relief, * * * it is damages or nothing." See *Davis* v. *Passman, supra,* slip op. 16-17.

[19] That is not to say that the Commission's fiscal limitations themselves justify implication of a cause of action: "[I]nstitutional limitations alone do not lead to the conclusion that any party * * * should have a cause of action." *Piper* v.

Thus, although the statute explicitly confers rights on a limited class of persons, *i.e.*, the clients of investment advisers, the enforcement mechanism expressly set forth in the statute does not, by itself, insure effective vindication of those rights. As emphasized in *Cannon*, this Court has never withheld a private remedy in such circumstances.

D. A federal cause of action to enforce Section 206 is necessary regardless of the existence of state regulation of investment advisers

The final factor to be considered, the applicability of state law in the area in which a federal right is sought to be implied, also supports the existence of a statutory cause of action under Section 206. As the Commission pointed out in its initial brief, the regulation of investment advisers is primarily a matter of federal law; state regulation in this area is of limited scope and largely patterned on the Investment Advisers Act (Br. 35-41).[20] The existence of a federal right of action to remedy fraudulent conduct by investment advisers is particularly important where, as here, the fiduciary relationship allegedly breached is itself prescribed by federal statute.

Chris-Craft Industries, Inc., supra, 430 U.S. at 41. The primary consideration, as noted above, is the intention of Congress, express or implicit.

[20] After examining this final factor, the Court held in *Cannon* that since the federal government and the federal courts were the primary source of protection against illegal discrimination, the subject matter of the suit did not involve a question that was "basically of concern to the States." Slip op. 29-30.

Congress enacted the Investment Advisers Act because of the inadequacy of state law in curbing misconduct by investment advisers. *Burks* v. *Lasker*, *supra*, slip op. 7 n.6; *Santa Fe Industries, Inc.* v. *Green*, *supra*, 430 U.S. at 471 n.11. Federal standards were intended to provide primary protection for advisory clients.[21] As noted in our initial brief at pages 39-41, reliance on inconsistent state law standards to protect advisory clients cannot be squared with the congressional purpose to create new, and more exacting, federal standards on a nationwide basis.[22] Recognition of an implied right of action is essential to surmount deficiencies in state law and to vindicate the enforcement goals contemplated by Congress. As the Court recently noted in *Burks* v. *Lasker*, *supra*, slip op. 7 n.6: "[A]s long as private causes of action are available in federal courts for violation of the federal statutes, this enforcement problem is obviated."

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[21] Congress did not, of course, intend to displace state regulation entirely; in fact, it expressly provided that nothing in the Investment Advisers Act would preclude state regulation in the absence of a conflict with the provisions of the statute. Section 222, 15 U.S.C. 80b-18a. Thus, the states are free to develop their own statutory schemes, provided such regulation does not infringe the Investment Advisers Act or its policies. *Burks* v. *Lasker*, *supra*, slip op. 7 & n.6.

[22] "[F]ederal courts must be ever vigilant to insure that application of state law poses 'no significant threat to any identifiable federal policy or interest.'" *Burks* v. *Lasker*, *supra*, slip op. 17.

II. PETITIONER'S ARGUMENTS BASED ON THE JURISDICTIONAL PROVISION OF THE INVESTMENT ADVISERS ACT ARE IRRELEVANT TO THE ISSUE TO BE DECIDED

Petitioners' central argument (Pet. Br. 7-10) against the existence of a private cause of action is based on the absence from Section 214 of the Act of language extending the jurisdiction of the district courts to "actions at law." That argument, however, may be quickly dismissed. As the Court explained in *Touche Ross & Co., supra*, slip op. 16, jurisdictional provisions generally are not relevant to the question whether an action should be implied under a substantive statutory provision. Section 214 grants the district courts jurisdiction over "violations of [the statute] * * * and concurrently with State and Territorial courts, of all suits in equity to enjoin any violation of [the statute]."[23] But, like Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. 78aa (the comparable jurisdictional provision of that statute), Section 214 "creates no cause of action of its own force and effect; it imposes no liabilities." *Touche Ross & Co., supra*, slip op. 16. Section

[23] To the extent that Section 214 creates any inference, it is that private actions were contemplated by Congress. It is certain that Congress did not anticipate that the Commission would proceed in state courts when it brought enforcement actions pursuant to the Act. See Section 209(c), (e), 15 U.S.C. 80b-9(c), (e), authorizing the Commission to sue in federal court when it seeks to enforce the statute. Thus, to the extent Congress conferred concurrent jurisdiction on the state courts, that jurisdiction was with respect to private suits.

214 merely supplements the general jurisdictional provision of 28 U.S.C. 1331 by removing the amount-in-controversy requirement of the latter statute. *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 289-290 (1940).

Here, as elsewhere, the source of plaintiffs' rights must be found, if at all, in the substantive provisions of Section 206 that they seek to enforce, not in the jurisdictional provision.[24]

III. BOTH EQUITABLE AND LEGAL REMEDIES ARE AVAILABLE IN A PRIVATE ACTION BASED ON SECTION 206

A question arose during the first oral argument in this case concerning the scope of available relief should a private action be recognized under Section 206—*i.e.*, whether both equitable and legal remedies should be available in appropriate cases.

That question arose, in part, as a result of the emphasis placed by petitioners (Pet. Br. 7-10) on the absence in Section 214 of language mentioning "actions at law." However, as this Court's recent decisions have confirmed, "the question whether a

[24] As the Court noted in *Leroy* v. *Great Western United Corp., supra*, slip op. 8-9 "[t]he reference in § 27 [of the Securities Exchange Act] to * * * 'liabilit[ies] or dut[ies]' * * * clearly corresponds to the various provisions in the 1934 Act that explicitly establish[ed] duties." Because the Investment Advisers Act created no express private remedies, Congress had no occasion to utilize language referring to "actions at law" and focused the jurisdictional provision on equitable proceedings that the Commission was authorized to bring.

litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis* v. *Passman*, *supra*, slip op. 11.[25] See also *Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 389.

As noted above, the provisions of Section 214 are not pertinent to the prior inquiry whether a cause of action exists. Nor, we submit, are the provisions of Section 214 meaningful with regard to the availability of private remedies once a cause of action is implied. Because Congress did not focus on private remedies when the statute was enacted, it simply made provision for equitable relief in Commission enforcement procedings. That does not suggest that private plaintiffs should be confined to remedies that were deemed to be appropriate and sufficient for administrative agencies. What was intended to be an adequate mechanism for administrative enforcement may not logically be viewed as an expression of legislative intent on the scope of appropriate relief in private suits. Moreover, restriction of defrauded

[25] In *Davis*, the Court concluded that a private cause of action could be implied to redress a violation of the Due Process Clause of the Fifth Amendment. Slip op. 5. Implication of remedies for constitutional violations raises questions different from those presented in cases involving federal statutes. For that reason, the Court declined to apply the *Cort* analysis. *Id.* at 12-13. The Commission nonetheless believes that the discussion in *Davis* separating the question of the availability of a "cause of action" from the availability of particular types of relief is equally applicable regardless of whether the Court is considering an issue of statutory or constitutional interpretation.

clients to equitable relief would conflict with the thrust of the modern law of remedies—which seeks to accord plaintiffs complete relief in light of injuries actually proven. This approach has superseded past distinctions between legal and equitable remedies. See Fed. R. Civ. P. 2, 54(c). See also *J. I. Case Co.* v. *Borak*, *supra*, 377 U.S. at 433; *Mills* v. *Electric Auto-Lite Co.*, *supra*, 396 U.S. at 386-389.[26]

[26] The distinction between legal and equitable relief would not be meaningful in most cases brought under the Investment Advisers Act, which involve claims of fraudulent breach of fiduciary duty. Equitable tribunals have long awarded monetary relief to redress such wrongs. See our opening brief at page 25 n.18. In any event, because the only question presented in the petition for certiorari is whether a private cause of action should be implied, and the courts below have not addressed the scope of available remedies, the Commission is of the view that that question, together with questions concerning the remaining elements of a cause of action, should be left for determination in the first instance by the lower courts.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

STEPHEN M. SHAPIRO
Assistant to the Solicitor General

RALPH C. FERRARA
General Counsel

PAUL GONSON
Principal Associate General Counsel

JAMES H. SCHROPP
Assistant General Counsel

ANNE C. FLANNERY
Attorney
Securities and Exchange Commission

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